A

Panaron Sdn Bhd v Univac Switchgear Sdn Bhd

B

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D5-28–370 OF 2006
WONG KIAN KHEONG JC
13 OCTOBER 2014

C

Civil Procedure — Winding up — Liquidators — Company that had already been wound up earlier — Application to stay second winding up order — Whether winding up order can be stayed — Jurisdiction of court to set aside earlier winding up order — Companies Act 1965 ss 243(1) & 253(2)

D

The respondent had been earlier wound up by another High Court ('earlier winding up order'). Without knowing this, the appellant applied to the High Court to wind up the respondent ('winding up order'). The application was allowed. Both High Court appointed official receivers ('OR') as liquidators for the respondent. After being aware of the earlier winding up order, the OR applied to the present court, inter alia, for a stay of the winding up order under s 243(1) of the Companies Act 1965 ('the Act'). The issues that arose for the court's adjudication were whether a winding up order could be stayed under s 243(1) of the Act; and whether the court had jurisdiction to set aside its earlier winding up order.

E

F

Held, allowing the application:

(1) Upon the making of the earlier winding up order, the present court had no jurisdiction under s 218(1)(a) to (n) of the Act to make the winding up order. There is no provision in the Act and Companies (Winding up) Rules 1972 ('Rules') which confers jurisdiction on this court to make the winding up order after the SAHC winding up order had been given. The winding up order was set aside (see paras 23 & 27).

G

(2) In view of the court's inherent jurisdiction to set aside the KLHC winding up order, the present court also relied on the court's inherent jurisdiction to make a consequential order that the five PODs shall be examined by the OR as the respondent's liquidator in the first liquidation under r 92 of the Rules. Such a consequential order is necessary in the interest of justice to ensure that the five creditors are not time-barred in the first liquidation by r 91(1) of the Rules in respect of the five PODs. The OR, as the respondent's liquidator in the first liquidation, had the duty to examine the five PODs and to admit or reject the five PODs as the OR sees fit under r 92 of the Rules (see para 31).

H

I

[Bahasa Malaysia summary

Responden telah terdahulunya digulung oleh Mahkamah Tinggi yang lain ('perintah penggulungan terdahulu'). Tanpa mengetahui perkara ini, perayu memohon kepada Mahkamah Tinggi untuk menggulung responden ('perintah penggulungan'). Permohonan dibenarkan. Kedua-dua Mahkamah Tinggi melantik pegawai penerima ('PP') sebagai likuidator untuk responden. Selepas mengetahui tentang perintah penggulungan terdahulu, PP memohon kepada mahkamah ini, antara lain, untuk penangguhan perintah penggulungan di bawah s 243(1) Akta Syarikat 1965 ('Akta'). Isu-isu yang berbangkit untuk penghakiman mahkamah adalah sama ada perintah penggulungan boleh ditangguhkan di bawah s 243(1) Akta; dan sama ada mahkamah mempunyai bidang kuasa untuk mengetepikan perintah penggulungan terdahulu.

Diputuskan, membenarkan permohonan:

(1) Semasa membuat perintah penggulungan terdahulu, mahkamah ini tidak mempunyai bidang kuasa di bawah s 218(1)(a) hingga (n) Akta untuk membuat perintah penggulungan. Tidak terdapat peruntukan dalam Akta dan Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah') yang mana memberikan bidang kuasa kepada mahkamah ini untuk membuat perintah penggulungan selepas perintah penggulungan MTSA telah diberikan. Perintah penggulungan diketepikan (lihat perenggan 23 & 27).

(2) Mengambil kira bidang kuasa sedia ada mahkamah untuk mengetepikan perintah penggulungan MTKL, mahkamah ini juga bergantung ke atas bidang kuasa sedia ada mahkamah untuk membuat perintah berbangkit bahawa kelima-lima POD akan diperiksa oleh PP sebagai likuidator responden di dalam likuidasi pertama di bawah k 92 Kaedah-Kaedah. Perintah berbangkit sedemikian adalah perlu dalam kepentingan keadilan untuk memastikan bahawa kelima-lima pemiutang tidak dihalang masa dalam likuidasi pertama oleh k 91(1) Kaedah-Kaedah berkaitan kelima-lima POD. PP, sebagai likuidator responden dalam likuidasi pertama, mempunyai kewajipan untuk memeriksa kelima-lima POD dan untuk memasukkan atau menolak kelima-lima POD jika PP bersesuaian di bawah k 92 Kaedah-Kaedah(lihat perenggan 31).]]

Notes

For cases on liquidator, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 10052–10054.

Cases referred to

Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & Another Application [2005] 3 MLJ 1; [2004] 4 CLJ 350, FC (refd)

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia)

Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)
Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2011] 1 MLJ 158, FC (refd)
K Balasubramaniam (liquidation for Kosmopolitan Credit & Leasing Sdn Bhd) (In liquidation) v MBF Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 CLJ 793, FC (refd)
Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd [2010] 4 MLJ 651, CA (folld)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374; [1996] 2 CLJ 586, FC (refd)
Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd [1996] 4 MLJ 343, HC (refd)
Quintraz Sdn Bhd v Rampai Galaksi Sdn Bhd [2015] 8 MLJ 1; [2014] 1 LNS 173; [2014] AMEJ 852, HC (refd)
Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830, CA (refd)
Vijayalaksmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)

Legislation referred to

Companies Act 1965 ss 218(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), 243, 243(1), 253(2)
Courts of Judicature Act 1964 ss 4, 23(2)
Companies (Winding up) Rules 1972 rr 7(2), 91(1), 92(2), 163, 194(1), First Schedule Form 1
Companies Act 1862 [UK] s 89
Companies Act 1985 [UK] s 549
Federal Constitution
Insolvency Rules 1986 r 747(1)
Rules of the High Court 1980 O 1 r 2(2), O 13 r 8, O 14 r11, O 19 r 9, O 35 r 2, O 81 r 7

Not present for the petitioner.

Ezwan bin Abdul Majid (Noormazlinah bt Abu Talib with him) (Official Receiver Jabatan Insolvensi Malaysia) for the respondent.

Wong Kian Kheong JC:

INTRODUCTION

[1] This case raises a novel question of whether the High Court has the jurisdiction to set aside its own winding up order of a company on the ground that the company has been earlier wound up by another High Court.

[2] On 25 May 2006, the petitioner company ('petitioner') presented to this court (KL High Court) a petition to wind up the respondent company ('respondent').

[3] The KL High Court ordered the respondent to be wound up on 12 September 2006 ('winding up order'). The winding up order appointed the official receiver (OR) as the liquidator for the respondent.

[4] Unknown to the petitioner, the respondent had been earlier wound up by the Shah Alam High Court (Shah Alam HC) on 17 July 2006 (earlier winding up order). The earlier winding up order had been obtained by another creditor of the respondent, Harting Singapore Pte Ltd. The OR was also appointed by the earlier winding up order as the respondent's liquidator.

[5] In respect of the liquidation under the winding up order ('second liquidation'), the OR had conducted a proof of debt (POD) exercise and five creditors of the respondent (five creditors) had filed their POD forms with the OR (5 POD's). The five creditors claimed that the respondent owed them a total of RM 1,727,252.84.

[6] In the second liquidation, the OR subsequently realised that the earlier winding up order had been made, Hence, in notice of application (NA) in court encl no 14 (this application), the OR applied to this court for, among others, the following orders:

(a) the winding up order be stayed under s 243(1) of the Companies Act 1965 ('the CA'); and

(b) the five POD's be transferred to the OR to be considered in the liquidation pursuant to the earlier winding up order (first liquidation).

[7] At the outset of the hearing of this application, the OR applied for the NA to be heard as a summons in chambers in accordance with r 7(2) of the Companies (Winding up) Rules 1972 ('WUR'). I allowed such an application under r 194(1)WUR as I have decided earlier in *Quintraz Sdn Bhd v Rampai Galaksi Sdn Bhd, Companies Winding Up* [2015] 8 MLJ 1; [2014] 1 LNS 173; [2014] AMEJ 852 that r 7(2) WUR has expressly provided for the use of a summons in Form 1 of the First Schedule to the WUR. Furthermore, there is no prejudice to any party by hearing this application as a summons in chambers.

CAN WINDING UP ORDER BE STAYED UNDER S 243(1) CA?

[8] Section 243(1) of the CA provides as follows:

(1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[9] In *Vijayalaksmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709, at pp 716-718, Mohd Dzaiddin FCJ (as His Lordship then was) delivered the Federal Court's judgment as follows:

It is clear from (s 243(1) CA) that the court has a discretion, on the application of the liquidator or Official Receiver, or any creditor or contributory to stay the proceedings under a winding-up order. But, before granting a stay, the section requires on proof to the satisfaction of the court that it ought to grant a stay. This means that the court has to be satisfied that it is right to stay the winding-up proceeding and if there be matters as to which the court has doubts, it should not grant a stay (*Re Lowston Ltd* [1991] BCLC 570).

The principles which govern the court in the exercise of its jurisdiction whether to grant or refuse a stay have been established in the following cases. In the leading case of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, Buckley J was dealing with an application under s 89 of the English Companies Act 1862, which is similar to our s 243, which provided that the court may at any time after a winding-up order, upon the application of any creditors or contributory and 'upon proof to the satisfaction of the court that all proceedings in relation to such winding-up ought to be stayed'. make an order staying the same. What then should be the material considerations to induce the court to order a stay? According to Buckley J (taken from the headnote which summarised the text of his decision) [1903] 2 Ch 174 at p 174:

In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual - in which cases the court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.

In refusing or postponing a stay of winding-up proceedings the court will have regard to the following facts:

(a) That directors have not complied with their statutory duties as to giving information to the Official Receiver or furnishing a statement as to the affairs of the company.

(b) That there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid shares forming the consideration for the purchase of property by the company on its formation.

(c) That the promoter has made gifts of fully paid shares to the directors.

(d) That there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the court to require investigation.

We pause here to state that we respectfully accept the above principles laid down by Buckley J and would apply them in dealing with the present appeal.

In *Krextile Holdings Pty Ltd v Widdows, Gillard J of the Supreme Court of Victoria held* [1974] VR 689, at p 694:

> It is not merely necessary for the applicant to establish that a stay is reasonable in the circumstances. He must satisfy the court it ought to grant a stay. As was emphasized by Buckley J in *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at p 182:
>
> > I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding up ought to be stayed. That will not be proved to my satisfaction until it is shown to me that all the facts are as I hope they are - that the trading operations of this company have been fair and above-board.

The above principles have been summarised by the learned editors of 1 *Palmer's Company Law* (24th Ed) para 88–28 at p 1390 as follows:

> *In exercising this discretion the court will be guided by the analogy of the former practice in bankruptcy in rescinding a receiving order – that is to say, it will consider the interests of commercial morality* and not merely the wishes of creditors, and will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation.

In *Re Calgary & Edmonton Land Co Ltd*, it was held that the jurisdiction of the court was discretionary and that it was for those who sought a stay to make out a sufficient case. Megarry J also dealt with the persons whose interests the court had to consider on an application for a stay. In his judgment ([1975] 1 All ER 1046 at p 1051; [1975] 1 WLR 355 at p 360), His Lordship stated:

> These must, of course, depend on the circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all the creditors and the expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three categories to consider. First, there are the creditors. ... Second, there is the liquidator ... Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets, and each should be protected

against the destruction of that right without good cause.

It will be observed that each of the heads is qualified by the words 'in normal circumstances'. I am not suggesting that in these cases there are hard and fast rules; but I am saying that the circumstances that I have mentioned will usually be at least highly material in deciding how the court's discretion should be exercised.

In summary, the principles which emerge from the above authorities are these:

(1) The granting of a stay under s 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.

(2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.

(3) *That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.*

(4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

It must, however, be remembered that the above considerations are not meant to be exhaustive, but they have been summarised to indicate that they had not been considered or discussed in the written judgment of the learned judge. (Emphasis added.)

[10] Based on the Federal Court's judgment in *Vijayalaksmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram*, I do not find any reason to stay the winding up order as the respondent is clearly insolvent with a total debt of RM1,727,252.84 due to the five creditors. I do not have the debt owed by the respondent to the petitioner in respect of the earlier winding up order. It is not in the interest of commercial morality and the public at large to stay the winding up order of an insolvent company which has been previously wound up by another court.

[11] There is another reason why I am not inclined to exercise my discretionary power under s 243(1) of the CA to stay the winding up order. In *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830, at p 833, NH Chan JCA in delivering the Court of Appeal's judgment held that the effect of a stay under s 243(1) of the CA is 'a total discontinuance or termination of the winding-up proceedings'. The Federal Court held in *Vijayalaksmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram*, at pp 715-716, there can be no partial stay of winding up proceedings under s 243(1) of the CA. If I stay the winding up order under s 243(1) of the CA, the second liquidation is permanently stayed. Consequently, this winding up court does not have any more power in the second liquidation, let alone to transfer the 5 POD's to the OR for the OR's consideration in the first liquidation.

[12] Rule 91(1) of the WUR provides a time period for a wound up company's creditors to file POD with that company's liquidator. If I have exercised my discretion to stay the winding up order under s 243(1) of the CA, the five creditors of the respondent will be prejudiced as they are now out of time under r 91(1) of the WUR to file their POD's with the respondent's liquidator for the first liquidation. The five creditors will have to apply to the Shah Alam High Court under r 91(2) of the WUR for extension of time to file their POD's in the first liquidation.

[13] For the above reasons, I cannot accede to this application to stay the winding up order under s 243(1) of the CA.

DOES COURT HAVE JURISDICTION TO SET ASIDE ITS EARLIER WINDING UP ORDER?

[14] In *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 4 MLJ 651, at pp 655-656, the appellant company was wound up by the respondent when the appellant company did not appear in the winding up court. The appellant company did not appeal to the Court of Appeal against this winding up order but instead filed an application to set aside this winding up order on the ground that the appellant company had no knowledge of the winding up proceedings. Alternatively, the appellant company applied for a stay of the winding up order under s 243(1) of the CA. The High Court dismissed the appellant company's application and the appellant company appealed to the Court of Appeal.

[15] The Court of Appeal dismissed the appellant company's appeal in *Megah Teknik Sdn Bhd*, at p 661, on the following grounds given by Abu Samah Nordin JCA (as His Lordship then was):

> *There is no express provision in the (CA) or in the (WUR) similar to* r 747(1) of the Insolvency Rules 1986. In the United Kingdom, before the Insolvency Rules 1986 came into force a winding up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay: *Re Intermain Properties Ltd* [1986] BCLC 265 or to appeal. See also 10 *Atkin's Court Forms* (2nd Ed) (1992 issue) at p 384; Derek French, Applications to Wind up Companies. *Until a similar provision is introduced into our (CA) or (WUR) we are of the considered view that a winding up which had been perfected and duly sealed cannot be set aside or rescinded save in those circumstances where the court may exercise its inherent jurisdiction*. Order 35 r 2 of the RHC (Rules of the High Court 1980) cannot be invoked to set aside a winding up order on the ground that it was made in default as the (CA), being a special law on matters pertaining to companies winding up does not expressly provide for it. Order 1 r 2(2) of the RHC states that the High Court rules shall have no effect in relation to proceedings in respect of which rules have been made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings. *The proper remedy which is provided by the (CA) is to apply for a stay under s 243 as was*

pointed out in Vijayalaksmi's case (Court of Appeal case, [1995] 1 MLJ 830) or to appeal against the winding up order as was done in Sri Hartamas Development Sdn Bhd. The court should refrain from the temptations of deciding a case on the basis that a provision similar to r 747 of the Insolvency Rules 1986 should have been introduced into the (CA) or the (WUR).

(Emphasis added).

[16] *Megah Teknik Sdn Bhd* relied on the earlier Court of Appeal case of *Vijayalakshmi Devi v Jegadevan*. The material facts of *Vijayalakshmi Devi v Jegadevan*, at pp 832–834, are as follows:

(a) on 5 September 1989, Nadchatiram Realities (1960) Sdn Bhd (NRSB) was wound up by a petition presented by the then Inland Revenue Department;

(b) the first to the third respondents applied for and obtained some relief from the winding up court on 24 January 1994 (High Court order dated 24 January 1994);

(c) on 22 March 1994, four contributories of NRSB then applied for and obtained a stay of NRSB's winding up order from the High Court under s 243(1) of the CA (High Court's permanent stay order);

(d) the appellant appealed to then Supreme Court against the High Court's permanent stay order. On 3 May 1994, the Supreme Court ordered a stay of the High Court's permanent stay order (Supreme Court's stay order);

(e) on 29 June 1994, the first to the third respondents applied to the winding up court which then set aside the High Court order dated 24 January 1994 (High Court order dated 29 June 1994); and

(f) the appellant appealed to the Court of Appeal against the High Court order dated 29 June 1994.

[17] It is to be noted that the Federal Court in *Vijayalaksmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 had set aside the High Court's permanent stay order but the Federal Court did not discuss whether a High Court may set aside its own winding up order.

[18] The Court of Appeal decided in *Vijayalakshmi Devi v Jegadevan*, at pp 832–834, as follows:

There is no rule of practice or statutory provision in this country which is equivalent to the UK r 7.47(1) of the Insolvency Rules 1986. ...

The proper course is to stay proceedings under the winding-up order, and not to discharge it (*Re Baxters Ltd* [1898] WN 60): *Palmer's Company Precedents* (17th Ed) Pt II Winding up' at p 96. It is the practice not to rescind the winding-up order, but to

A stay proceedings under it (*Re Baxters*, 2 Supreme Court Practice 1993 para 5220 at p 1618). See also 10 *Atkin's Court Forms* (2nd Ed, 1992 Issue) at p 46 and at p 386, Forms 111 and 112 for the application and order. ...

A winding-up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding-up order: see s 342(1) (CA). ...

Despite the order of 22 March 1994 which still exists, the judge on 29 June 1994 entertained and heard an application by the first, second and third respondents to set aside an earlier order dated 24 January 1994 (and another order dated 7 January 1991 but that was withdrawn at the hearing) which had been obtained by the appellant in the winding-up court, and for other reliefs. The judge allowed the application. Against this order dated 29 June 1994, the appellant has appealed to this court.

It is because the order dated 22 March 1994 still exists that the judge ought not to have heard the application or to have made any order on it after that date in proceedings under the winding-up order.

For the reasons stated above, we have allowed the appeal and set aside the order dated 29 June 1994.

If it were otherwise, so that the order dated 29 June, 1994 were allowed to remain undisturbed and the order dated 22 March 1994 was affirmed by the Federal Court on appeal, it would have made the decision of the Federal Court nugatory as well as nonsense of the order of the High Court dated 22 March 1994. This is because by affirming the order dated 22 March 1994, the winding-up order and all proceedings under it would have been totally discontinued, and that would have made it impossible for the order dated 29 June 1994 to have been made under the discontinued proceedings.

(Emphasis added).

[19] The High Court in a judgment given by Abu Samah Nordin J (as His Lordship then was) in *Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd* [1996] 4 MLJ 343, at pp 348-349, also held that the winding up court has no jurisdiction to set aside a perfected winding up order:

I am of the considered view that the (CA) or the (WUR) make no express provision enabling the High Court to set aside or rescind a winding-up order after it had been perfected. The scheme of the [CA] Is such that an aggrieved party may under s 253 (CA) appeal against a winding-up order (see *Sri Hartamas Development Sdn Bhd*, 1 *Palmer's Company Law* (24th Ed) at p 1839), or apply to stay the proceedings under s 243 (CA) altogether or for a limited time, under terms and conditions which the court thinks fit. A stay of a winding-up proceeding altogether has the effect of a total discontinuance or termination of the winding-up proceedings. A winding-up order could not be discharged or rescinded after it has been made (see *Vijayalaksmi Devi*'s case; *Re Baxters Ltd* [1898] WN 60, *Quicksafe Freightlines Pty Ltd v Shell Company of Australia Ltd* (1985) 3 ACLC 257). There is no provision under (CA) or (WUR) akin to O 13 r 8, O14 r11, O19 r 9, or O81 r 7 of the RHC. Order 1 r 2(2) provides that 'These rules shall not have effect in relation to proceedings in respect of which

> rules have been made or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.' Proceedings for winding up of a company are essentially governed by the (CA) or (WUR).
>
> The court cannot fill in the gaps left by the Legislature ....
>
> The (CA) or (WUR) have no corresponding provision similar to r 7.47(1) of the English Insolvency Rules 1986 which provides that, 'every court having jurisdiction under the Act to wind up companies may review, or vary an order made by it in the exercise of that jurisdiction'. In *Re Intermain Properties Ltd* [1986] BCLC 265, the court held that it did not have jurisdiction to rescind a perfected winding-up order and the proper procedure for the petitioner was to apply on notice of motion for a stay of the winding up under s 549 of the English Companies Act 1985 (see also *Apirami Sdn Bhd* and *The Law of Company Liquidation* by McPherson and JO Donovan at p 443.) With respect, I am unable to follow the decision of the learned Thomas J in *Bridon New Zealand Ltd v Tent World Ltd* [1992] 3 NZLR 725 who elected, 'to review the rule and discard it on the basis that it has outlived its usefulness'. even though there was no corresponding provision akin to r 7.47 of the English Insolvency Rules 1986'.

(Emphasis added).

[20] In *Vijayalakshmi Devi v Jegadevan*, as the High Court's permanent stay order has already been made, the High Court should not have subsequently made the High Court's order dated 29 June 1994 (which set aside the High Court's order dated 24 January 1994). More importantly, *Vijayalakshmi Devi v Jegadevan* did not concern an application to the winding up court to set aside an earlier winding up order.

[21] I am bound by the Court of Appeal's decision in *Megah Teknik Sdn Bhd* that our present CA and WUR do not allow a winding up court to revisit a perfected winding up order. According to *Megah Teknik Sdn Bhd*, once a winding up order has been sealed, that order can only be set aside in either one of the following circumstances:

(a) an appeal is made to the Court of Appeal against the winding up order under s 253(2) of the CA. In this case, it is understandable why the respondent did not appeal to the Court of Appeal against the winding up order; or

(b) the winding up order is permanently stayed under s 243(1) of the CA. For reasons explained above, I cannot accede to this course of action in this case

(2 Options).

[22] The Court of Appeal in *Megah Teknik Sdn Bhd*, at p 661, did recognise one exception to the two options when the winding up court may exercise its inherent jurisdiction. The Court of Appeal did not however elaborate in *Megah*

Teknik Sdn Bhd when the winding up court's inherent jurisdiction may be invoked.

[23] Upon the making of the earlier winding up order, it is clear that this court has no jurisdiction under any of the paragraphs in s 218(1)(a) to (n) of the CA to make the winding up order. There is no provision in the CA and WUR which confers jurisdiction on this court to make the winding up order after the earlier winding up order has been given. In fact, after the earlier winding up order, under s 233(1) of the CA the respondent's liquidator, namely OR, '*shall take into his custody or under his control all the property and things in action to which the (respondent) is or appears to be entitled*' (please see the Federal Court's judgment in *K Balasubramaniam (liquidation for Kosmopolitan Credit & Leasing Sdn Bhd) (In liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201 at p 212; [2005] 1 CLJ 793, at p 805). Accordingly, the cause papers for this case should have been served on the OR as the respondent's liquidator (by virtue of the earlier winding up order) and not on the respondent.

[24] The following Federal Court's judgments in chronological order clearly state that a superior court, such as the High Court, has an inherent jurisdiction to set aside its earlier order which has been made without jurisdiction:

(a) in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 at pp 382-383; [1996] 2 CLJ 586, at pp 593-594, Edgar Joseph Jr FCJ held that the *functus officio* doctrine does not apply when the sealed order in question is a nullity for contravening an 'essential' provision of the law, such as the requirement of service of legal process;

(b) *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, at pp 92-93, 97 (judgment by Azmi FCJ which was concurred by Eusoff Chin CJ and Wan Adnan Ismail FCJ (as His Lordship then was), pp 113 and 117 (judgment by Gopal Sri Ram JCA (as His Lordship then was));

(c) *Allied Capital Sdn Bhd v Mohd Latiff Shah Mohd & Another Application* [2005] 3 MLJ 1 at p 10; [2004] 4 CLJ 350, at p 360 (dissenting judgment by Abdul Hamid Mohamad FCJ (as His Lordship then was)) and (majority judgment by Rahmah Hussein FCJ and Richard Malanjum JCA (as His Lordship then was));

(d) *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137 at p 151; [2008] 6 CLJ 1, at p 15 (judgment by Zaki Tun Azmi PCA (as His Lordship then was)); and

(e) *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158, at p 168 (judgment by Zulkefli FCJ (as His Lordship then was)).

[25] In *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533, at p 534, VC George J (as His Lordship then was) held that s 23(2) of the Courts of Judicature Act 1964 ('the CJA') provides 'confirmation' that the High Court continues to enjoy its inherent powers. Section 23(2) of the CJA states as follows:

> 23(2) *Without prejudice to the generality of subsection (1) the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day* ...

(Emphasis added.)

[26] It is to be noted that s 4 of the CJA provides that if there is any conflict between CJA and any other written law (other than the Federal Constitution), CJA shall prevail.

[27] In view of the above Federal Court cases as well as the dictum in *Megah Teknik Sdn Bhd*, at p 661, the winding up court possesses inherent jurisdiction to set aside an earlier winding up order which has been duly perfected. In view of the earlier winding up order, I find that this court has no jurisdiction under s 218(1)(a) to (n) of the CA to make the winding up order. Accordingly, I set aside the winding up order with effect from the hearing of this application on 18 September 2014.

WHAT HAPPENS TO 5 POD'S?

[28] As the setting aside of the winding up order is made prospectively with effect from 18 September 2014, the validity of the 5 POD's is not adversely affected by the setting aside of the winding up order.

[29] Rule 163 of the WUR provides as follows:

> Where an order has been made for the winding-up of a company the *Judge shall have power without further consent to order the transfer to him of any action cause or matter pending brought or continued by or against the company*.

(Emphasis added.)

[30] It is clear that r 163 of the WUR only empowers 'any action cause or matter' to be transferred to the winding up court and not the converse. Hence, I cannot rely on r 163 of the WUR to transfer the 5 POD's to the respondent's liquidator, the OR, in the first liquidation.

[31] In view of my exercise of inherent jurisdiction to set aside the winding up order, I also rely on the court's inherent jurisdiction to make a consequential order that the 5 POD's shall be examined by the OR as the respondent's

liquidator in the first liquidation under r 92 of the WUR. Such a consequential order is necessary in the interest of justice to ensure that the five creditors are not timebarred in the first liquidation by r 91(1) of the WUR in respect of the 5 POD's. The OR as the respondent's liquidator in the first liquidation, has the duty to examine the 5 POD's and to admit or reject the 5 POD's as the OR sees fit under r 92 of the WUR.

THE COURT ORDER

[32] The following orders are made for this application:

(a) the winding up order is set aside with effect from the hearing of this application, namely 18 September 2014;

(b) the 5 POD's shall be examined by the OR as the respondent's liquidator in the first liquidation under r 92 of the WUR; and

(c) costs of RM1,000 to the OR for this application to be paid from the assets of the respondent.

Application allowed.

Reported by Afiq Mohamad Noor